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Supreme Court, U.

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M. RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-303

THOMAS J. PALMER, INC., LAKE CONSTRUCTION CO.,
INC., KENNETH G. WALKER and THOMAS J. PALMER,
Petitioners,

vs.

CROCKER NATIONAL BANK and SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE COUNTY OF LOS
ANGELES,

Respondents.

**Petition for a Writ of Certiorari to the Supreme Court
of the State of California.**

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Respondents.

**Petition for a Writ of Certiorari to the Supreme Court
of the State of California.**

Petitioners respectfully pray that a writ of certiorari issue to review the final order of the Supreme Court of the State of California entered herein on May 26, 1977 denying petitioners' "Petition for Hearing on Peremptory Writ of Prohibition Issued by the Court of Appeal of the State of California, Second Appellate District."

Opinion Below.

The order of the court below had the effect of affirming the reported decision of the Court of Appeal of the State of California, filed April 1, 1977 (appended hereto, infra, Appendix, Exhibit "A", p. 1).

Jurisdiction.

The final order of the California Supreme Court was made and entered on May 26, 1977 (appended hereto, infra, Appendix, Exhibit "B"; p. 13). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Questions Presented.

(1) Does *12 U.S.C. 91* of the National Bank Act deprive a California State Court of jurisdiction to issue a preliminary injunction enjoining a national bank, prior to final judgment, where property of such bank is not involved?

(a) Does an order enjoining a national bank from paying a creditor, pursuant to a letter of credit, affect the property of the bank or the property of the creditor?

(2) Does *12 U.S.C. 91* immunize a national bank from responsibility for knowingly aiding or abetting others in the violation of a preliminary injunction issued prior to final judgment?

Statutory Provision Involved.

The statutory provision involved is *12 U.S.C. 91* which provides, in pertinent part:

". . . no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court."

The word "association", as used, refers to national banks such as Crocker National Bank.

Statement of the Case.

Pursuant to a verified complaint filed by the Real Parties in Interest, Petitioners herein, seeking injunctive relief and damages in excess of half a million dollars, the Superior Court of the State of California issued, after hearing, its Preliminary Injunction, dated November 15, 1976 (appended hereto, infra, Appendix, Exhibit "C", p. 14).

The Preliminary Injunction enjoined the defendants, including Crocker National Bank, and their officers, agents, representatives and all persons acting in concert or participating with them from engaging in, committing or performing, directly or indirectly, or by any means whatsoever, any of the following acts:

(a) From disbursing or paying or causing to be disbursed or paid, any sums of money, credit or other emoluments under or pursuant to any of the provisions of that certain letter of credit represented or evidenced by a written "application and security agreement for a commercial letter of credit" dated December 4, 1975, No. 737415, and/or a letter of credit dated December 4, 1975, and/or an amendment thereto dated December 5, 1975; issued by Crocker National Bank, a copy of said documents being attached to the application made herein.

(b) From engaging in any act or omission to act which might cause any honoring of said letter of credit or which might cause the disbursement of any money, credit or other emoluments thereunder by Crocker National Bank.

The decision of the Court below, relying *solely* on the "prohibition" of *12 U.S.C. 91*, dissolved the Preliminary Injunction as to Crocker National Bank *only*, and let it stand as to all other defendants.

The verified complaint sets forth, among other matters, that Petitioners herein procured a letter of credit in the amount of \$522,000.00 from Crocker National Bank; the beneficiary of the letter of credit was defendant Turkiye Is Bankasi AS (Turkish Bank). The letter of credit was in the nature of a performance bond to guaranty the sale of coal under a contract between defendant Turkiye Demir Ve Celik Isletmeleri Genel Mudurlugo (Steel Works), as buyer, and a company known as Natico, as seller. Petitioners herein were not parties to the contract between the "Steel Works" and "Natico".

In the event of a breach of the contract relating to the purchase and sale of coal, the *purchaser* (Steel Works) can make demand upon the "Turkish Bank" for \$522,000.00; in turn the "Turkish Bank" can make demand upon Crocker National Bank for \$522,000.00 under the letter of credit and Crocker National Bank can, in turn, make demand upon Petitioners herein for \$522,000.00.

The verified complaint alleges a conspiracy and fraud between the "Steel Works" and the "Turkish Bank" to wrongfully cause the "Turkish Bank" to pay \$522,000.00 to the "Steel Works" and to demand a like sum from Crocker National Bank under the letter of credit; Crocker National Bank will, in turn, demand such sum from Petitioners.

No breach or violation of the contract relating to the sale of coal has occurred by Natico and any demand upon the letter of credit is improper and unconscionable.

At present the Preliminary Injunction restrains the "Steel Works" and the "Turkish Bank" from engaging

in any conduct which might cause Crocker National Bank to pay under the letter of credit; it also enjoins *all others* from acting or participating with them, directly or indirectly, or by any means whatsoever, in any conduct which might cause Crocker National Bank to honor the letter of credit procured by Petitioners.

However, the Preliminary Injunction has been dissolved as to Crocker National Bank *only*, and notwithstanding the validity of the injunction as to the "Turkish Bank" and Turkish "Steel Works", Crocker National Bank will pay under the letter of credit upon demand of the "Turkish Bank" and will in turn make demand upon Petitioners for a like amount.

Although the injunction enjoins "all others" from aiding or abetting the "Steel Works" or "Turkish Bank" from making demand upon the letter of credit or causing it to be paid, Crocker National Bank states it will pay under the letter of credit if demand is made upon it and feels it can do so with impunity under the immunity provisions of 12 U.S.C. 91 as interpreted by the Court below.

We have here a situation where a national bank, under the guise of 12 U.S.C. 91, will aid and abet others, lawfully enjoined, in the violation of a Preliminary Injunction.

The bank, having knowledge of the valid Preliminary Injunction, should not be allowed to knowingly engage in conduct which will frustrate and render impotent the properly exercised injunctive powers of a state court.

The letter of credit here involved represents an obligation, a contingent account payable, of Crocker National Bank to the "Turkish Bank"; a liability, not an asset.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

This Court has held that a state court can issue an injunction against a national bank where such injunction does not relate to the "bank's assets". (*Earle v. Commonwealth of Pennsylvania*, 178 U.S. 449, 454, 20 S.Ct. 915, 44 L.Ed. 1146; *Capital National Bank of Lincoln v. First National Bank of Cadiz*, 172 U.S. 425).

The same limitation on 12 U.S.C. 91 has long been recognized by state courts. (*First National Bank of Oakland v. Superior Court of Santa Clara County*, (1966), 240 Cal.App.2d 109, 49 Cal.Rptr. 358; *Korn Exchange Bank v. Blye* (1896), 4 N.E. 635, 101 N.Y. 303; *Monmouth First National Bank v. Dunbar* (1887) 9 N.E. 186, 118 Ill. 625; *Drewes & Co. v. Ham & Seymour* (1925) 157 La. 861, 103 So. 241; *Patek v. Patek* (1911), 166 Michigan 433).

The letter of credit here involved represents an account payable of the national bank to the "Turkish Bank". It is an asset (a contingent account receivable) of the "Turkish Bank" and a liability (a contingent account payable) of the national bank.

"Assets" are defined as follows:

"The aggregate of available property, stock in trade, cash, etc., belonging to a merchant or merchantile company. . . . The term 'assets,' as applied to a bank, is broad enough to cover anything which is or may be available to pay creditors but, as usually understood, it refers to the tangible property of the corporation, and not to the liability of the stockholders contingent upon insolvency. *Hill v. Smothers*, 173 N.C.

642, 92 S.E. 607, 609; *Deariso v. Mobley*, 38 GA.App. 313, 143 S.E. 915, 920." (*Black's Law Dictionary* (4th Ed.) West Publ. Co., p. 151).

Webster's Seventh New Collegiate Dictionary (1971), p. 53, defines "Asset" as follows:

"The entire property of all sorts of a person, association, corporation, or estate applicable or subject to the payment of his or its debts."

"Liability" is defined in *Union Oil Company of California v. Basalt Rock Company, Inc.* (1939) 30 Cal.2d 317, 86 P.2d 139, 141, as follows:

"Liability is a condition which creates a legal duty to perform an act, but the performance may be immediate or in the future. 36 Cor.Jur., p. 1050 et seq."

The letter of credit here involved represents an obligation (liability) of Crocker National Bank to pay \$522,000.00 to the "Turkish Bank" upon the happening of certain specified acts. It is not an asset of Crocker National Bank; it is not available to the national bank for payment to its creditors.

12 U.S.C. 91 does not preclude a state court from enjoining payment by a national bank to one of its alleged creditors, i.e., the "Turkish Bank".

In the instant case the defendants "Turkish Bank" and "Steel Works" are enjoined from taking any action which might cause the national bank to pay under the letter of credit; yet, 12 U.S.C. 91 as applied by the court below will allow the bank to pay under the letter of credit (as it states it will) if demand is made upon it, and thus render the Preliminary Injunc-

tion impotent and completely frustrate the injunctive process of the state court, irreparably damaging Petitioners.

The Preliminary Injunction does not involve the property or asset of a national bank. 12 U.S.C. 91 does not allow a national bank to knowingly aid and abet others in the violation of a valid preliminary injunction; a situation which will occur if the decision of the court below is allowed to stand.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BAUM & COHEN,

By LEONARD P. BAUM,

Attorneys for Petitioners.

APPENDIX.

Exhibit "A". Decision of the Court of Appeal of the State of California.

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

CROCKER NATIONAL BANK, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent.

THOMAS J. PALMER, INC., LAKE CONSTRUCTION CO., INC., KENNETH G. WALKER, and THOMAS J. PALMER, Real Parties in Interest. 2d Civil No. 49909 (Sup. Ct. No. SOC 44418).

Filed: April 1, 1977.

Morrison & Foerster, Girvan Peck and Ronald R. Brot for Petitioner.

No appearance for Respondent.

Baum & Cohen and Leonard P. Baum for Real Parties in Interest.

INTRODUCTION

Petitioner Crocker National Bank (hereinafter Crocker) is a defendant in a civil action filed in the superior court (Los Angeles Superior Court No. SOC 44418) in which the plaintiffs (Thomas J. Palmer, Inc., Lake Construction Co., Inc., Kenneth G. Walker, and Thomas J. Palmer) are the real parties in interest herein.

The underlying complaint (No. SOC 44418) of the real parties in interest sounding in breach of contract and fraud prays for money damages against all defendants except Crocker. As to defendant Crocker, it prays for a temporary restraining order, preliminary injunction and permanent injunction forever enjoining defendant Crocker from borrowing or otherwise disbursing sums of money under the terms and provisions of a certain \$522,000 letter of credit.

The superior court granted the preliminary injunction and petitioner Crocker seeks a writ of prohibition directing that court to vacate its order granting the injunctions.¹

THE CASE

The facts and positions of the parties can reasonably be gleaned from the record as set out below.

The underlying verified complaint (No. SOC 44418) filed by plaintiffs (real parties in interest) which was considered by the court below alleges that Natisco, a joint venture comprised of two Alabama corporations, entered into a contract to sell coal (hereinafter Coal Sales Contract) to defendant Turkish Iron and Steel Works (hereinafter Turkish Steel), and that the Coal Sales Contract required that the buyer, Turkish Steel, provide the seller, Natisco, with a letter of credit for the payment of the coal and in addition, required

¹This court previously denied Crocker's petition for writ of prohibition upon the ground that there was a remedy by appeal. However, the California Supreme Court granted a petition for hearing and transferred the cause to this court with the direction that an alternative writ of prohibition issue. Under the circumstances it is not necessary to discuss the propriety of relief by writ of prohibition. (*Atlantic Richfield Co. v. Superior Court* (1975) 51 Cal.App.3d 168, 170.)

that Natisco, as seller, guarantee its performance by way of a letter of bank guaranty.

The complaint further alleges that in a separate contract (hereinafter Financing Contract) plaintiffs agreed to furnish a letter of credit in the amount of \$522,000 in order to satisfy Natisco's guaranty of performance obligation under the Coal Sales Contract; that in return, Natisco, the two Alabama corporations which formed Natisco, defendant Vulcan Energy Resources, a corporation, and defendant Charles S. Pettyjohn, an individual, agreed to furnish plaintiffs with a true copy of a \$243,000 letter of credit allegedly previously secured as part of the seller's performance guaranty under the Coal Sales Contract; that in addition the same parties agreed, *inter alia*, to give plaintiffs security interests in certain coal, a pledge of stock in the two Alabama corporations which had formed Natisco, the right to certain dollar amounts per ton of coal sold under the Coal Sales Contract and the assignment of Turkish Steel's letter of credit; that the terms and provisions of the Coal Sales Contract were not to be altered, amended or changed without the prior written consent of one of the plaintiffs.

It is further alleged that on December 4, 1975, plaintiffs arranged to have Crocker issue an irrevocable letter of credit in the amount of \$522,000 in favor of the beneficiary, defendant Turkiye Is Bankasi AS (hereinafter Turkish Bank); that the initial documentary requirement provided that the Turkish Bank furnish an authenticated cable stating that the amount drawn represents the amount it was required to pay under its guaranty of performance by Natisco for the delivery of coal in 1976 to Turkish Steel under the Coal Sales

Contract and providing that the expiration date was December 31, 1976; that on December 5, 1975, that documentary requirement was cancelled in its entirety and a substituted documentary requirement provided for a signed statement by the Turkish Bank stating that the amount drawn represents the amount it was obligated to pay under its guarantee validity (unlimited in time) to Turkish Steel for the sum of up to \$522,000 covering performance under the Coal Sales Contract (identified by reference numbers, date and parties) for the account of Natisco pertaining to shipments of 450 thousand tons of coal to be delivered in 1976 according to the delivery schedule in the Coal Sales Contract; that the substituted provisions also stated that the letter of credit would be automatically extendable for further periods of six months until the Turkish Bank's guaranty was returned to it.

The complaint additionally alleged that in March 1976 the Coal Sales Contract was amended in writing by Turkish Steel and Natisco without plaintiffs' consent which had the effect of altering and diminishing plaintiffs' rights under the Financing Contract and making plaintiffs' letter of credit a guaranty and performance bond as to the amended Coal Sales Contract.

The complaint further sets forth that after the parties (other than plaintiffs) failed to fulfill their obligations under the Financing Contract, on April 13, 1976, plaintiffs foreclosed upon the pledge of stock and thereby became the owner of all of the stock in one of the Alabama corporations and 98 percent of the stock in the other; that plaintiffs brought an action in Alabama against defendant Pettyjohn and others (who are not named defendants in the California action);

that the Alabama court found that the defendants in the Alabama proceedings had made shipments of coal under the Coal Sales Contract after April 13, 1976, without authority to make such shipments on behalf of Natisco which plaintiffs then owned by reason of the foreclosure of stock; that the Alabama court permanently restrained the Alabama defendant from acting under the name of Natisco, from using the letters of credit emanating from the Coal Sales Contract, from making shipments of coal under the Coal Sales Contract with Turkish Steel, and from referring to the Coal Sales Contract by its reference numbers.

The complaint alleges that the defendants (excluding Crocker) have entered into a common plan or scheme to obtain and usurp the benefits of the Coal Sales Contract and plaintiffs' letter of credit; to prevent Natisco from performing under, or obtaining the benefits of, the Coal Sales Contract; to represent that they were authorized to act on behalf of Natisco; and to create irreparable injury to plaintiffs including the loss of \$522,000 if demand is made upon the Crocker letter of credit.

In its answer to the above described complaint Crocker denied (upon the basis of lack of information and belief) the substantive allegations in the complaint as to the alleged wrongful acts of the other defendants, expressly denied that it knew or should have known that plaintiffs were the owners of Natisco after April 13, 1976, and that none of the defendants were authorized to act for Natisco after that date, and denied that plaintiffs will suffer irreparable harm if Crocker is not restrained from enforcing the letter of credit. Crocker, however, admitted that upon proper demand

by the Turkish Bank it would honor the plaintiffs' letter of credit.

In addition to submitting points and authorities in opposition to plaintiffs' (real parties in interest) application for a preliminary injunction, Crocker filed the declaration of Charles H. Hallock, vice president and manager of its Los Angeles international banking office. Mr. Hallock first stated that Crocker was a national banking association. He then summarized the transaction in point and the custom and usage of letters of credit in international banking. He particularly stressed the fact that banks, in dealing with a letter of credit, deal only with the documents and do not become involved in the underlying transaction. He further stated that international letters of credit are subject to a document entitled Uniform Customs and Practices and attached a copy to his declaration.

He further stated that no signed statements requiring payment upon the letter of credit had been received by Crocker as of November 10, 1976. He expressed his confidence that if Crocker failed or refused to honor the letter of credit the Turkish Bank would exercise a banker's offset against Crocker's deposits which deposits with the Turkish Bank total more than \$522,000 and Crocker would also suffer damage to its international reputation if it failed to honor the letter of credit.

The record before this court contains only the supplemental points and authorities filed by the plaintiffs and does not contain the first set of points and authorities or a transcript of the hearing. Crocker states and plaintiffs do not dispute that the only evidence presented by plaintiffs to the superior court was the above described verified complaint.

DISCUSSION

The foregoing reflects that there are three distinct contracts involved.

First, there is the Coal Sales Contract which is an agreement between Natisco and Turkish Steel.

Second, there is the Financing Contract, hereinbefore described, between the plaintiffs and the defendants, other than Crocker, who were, or had some interest as, sellers under the Coal Sales Contract.

Third, there is Crocker's letter of credit, which is independent of the underlying contract. (See *S. L. Jones & Co. v. Bond* (1923) 191 Cal. 551, 555; *Dynamics Corp. of Amer. v. Citizens & Southern Nat. Bank* (N.D.Ga. 1973) 356 F.Supp. 991, 995.)

Since the preliminary injunction enjoins Crocker's performance under that third contract, the nature of Crocker's letter of credit is of paramount importance.

Crocker first contends that the trial court was without jurisdiction to issue a preliminary injunction against it, a national banking association, by virtue of a federal statute (12 U.S.C. § 91 [hereinafter Section 91]) which provides, in pertinent part, that "no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any . . . action . . . in any State . . . court."

Crocker points to *Kemple v. Security First Nat. Bank* (1967) 249 Cal.App.2d 719, and *First Nat. Bank v. Superior Court* (1966) 240 Cal.App.2d 109, in support of its position in this respect. The cases of *Kemple* and *First Nat. Bank* involved an attempt to restrain the foreclosure of trust deeds in which the national banking association was the named bene-

ficiary and both held that California was without jurisdiction by reason of Section 91 to issue either a temporary restraining order or a preliminary injunction against a national banking association. In both *Kemple* and *First Nat. Bank* there was clearly an attempt to enjoin a national banking association's general assets.

Plaintiffs (real parties in interest) on the other hand point to *Drewes & Co. v. Ham & Seymour* (1925) 157 La. 861 [103 So. 241], which held that, despite the provisions of U.S. Revised Statutes section 5242 (now Section 91), a state court has the authority to issue a preliminary injunction restraining a national banking association from paying a draft under a letter of credit in a case where the bank has no interest in the controversy between the parties other than its obligation to pay out funds in accordance with the letter of credit.² In reaching that holding *Drewes* reviewed *Pacific National Bank v. Mixter* (1888) 124 U.S. 721 [31 L.Ed. 567, 8 S.Ct. 718] (no state attachment of funds of bank on deposit to its credit in another national bank); *Van Reed v. People's National Bank* (1904) 198 U.S. 554 [49 L.Ed. 1161, 25 S.Ct. 775] (no state attachment of assets and property of bank); and *Earle v. Pennsylvania* (1900) 178 U.S. 449 [44 L.Ed. 1146, 20 S.Ct. 915] (state court could attach property held by bank for another) and found the case before it similar to the fact situation in *Earle*.

Drewes apparently relied upon cases dealing with attachments because in that case the bank had a special deposit to cover draws upon the letter of credit. Thus, the *Drewes* court concluded that since the special deposit

was not subject to be drawn against for all purposes, the special deposit was not an asset or property of the bank and hence a preliminary injunction could issue.

The traditional documentary letter of credit, which was present in *Drewes, supra*, is a method to insure payment for the sale of tangible goods. The buyer of the goods engages a bank to issue a letter of credit in favor of the seller (beneficiary). The resulting letter of credit is a contract between the bank and the beneficiary in which the bank agrees to honor drafts drawn by the seller upon the presentation of specified documents (i.e., bills of lading) which represent title to the goods sold. (Verkuil, *Bank Solvency and Guaranty Letters of Credit* (1973) 25 Stan.L.Rev. 716, 718; White & Summers, *Handbook of the Law under the Uniform Commercial Code* (1972) pp. 601-606; The Uniform Commercial Code (1962) 37 State Bar J. 119, 171.)

In contrast here the customers, plaintiffs (real parties in interest), were neither sellers nor buyers in the underlying coal sales transaction, engaged Crocker to issue a letter of credit in favor of the Turkish Bank who also was neither a seller nor a buyer. The Turkish Bank's connection was by reason of its "guarantee validity." The record is silent as to the terms and date of that "guarantee validity."

In short, apparently what is present in the instant case is a letter of credit of guarantee for a "guarantee validity" by the Turkish Bank of a third party seller's performance under a contract (the Coal Sales Contract). Upon presentation of the documentary requirement (the signed statement by the Turkish Bank in accordance with the provisions of the letter of credit),

²A similar issue was raised but expressly not decided in *Intern. Leather, etc. v. Chase Manhattan Bank* (1974) 45 A.D.2d 108 [356 N.Y.S.2d 314].

Crocker is to honor drafts from its own funds. However, unlike the situation in a traditional letter of credit, as hereinbefore described, Crocker will receive no documents of title and hence cannot have, under any circumstances, a security interest in the goods sold. In addition, the present letter of credit differs from the traditional one in that there will be no draw upon the letter of credit if the underlying transaction proceeds as planned while with a traditional letter of credit a draw upon the letter of credit is contemplated upon performance of the underlying transaction. (See Verkuil, *Bank Solvency and Guaranty Letters of Credit*, *supra*, 25 Stan.L.Rev. 716, 721-723; Note, *Guaranty Letters of Credit: Problems and Possibilities* (1974) 16 Ariz.L.Rev. 822, 827.) Nevertheless under the present letter of credit as well as under the traditional letter of credit, the issuer's liability to the beneficiary is a primary one and not that of a guarantor.³

³Admittedly there is some question about the true nature of the letter of credit in the present case. The function of Crocker's letter of credit is similar to a performance bond. (Cf. Note, *Guaranty Letters of Credit: Problems and Possibilities*, *supra*, 16 Ariz.L.Rev. 822, 827-829.)

On the other hand, difficulty in precise classification is understandable in that the letter of credit has long been a flexible device utilized by the commercial community to meet its needs in a wide variety of situations. Neither the Uniform Commercial Code nor the California Commercial Code attempted to establish rigid rules for letters of credit. Rather the intent was merely to state fundamental principles and to provide a basic framework for future change. (Cf. official com. to U. Com. Code, § 5-102; Williams, *Intro. Com.*, West's Ann. Cal. U. Com. Code, Div. 5, *Letters of Credit*.)

As this court deals only with the narrow issue of whether California may issue a preliminary injunction against a national banking association, we need not decide if the parties' classification of the document as a letter of credit is, indeed, correct (cf. *Wichita Eagle & B. Pub. Co., Inc. v. Pacific Nat. Bk., San Fran.* (9th Cir. 1974) 493 F.2d 1285) for any other classification would only serve to reinforce our conclusion, *infra*, that the bank's property and assets are involved.

(*S. L. Jones & Co. v. Bond*, *supra*, 191 Cal. 551; Cal. U. Com. Code, § 5103, subd. (1)(a).)

Here Crocker has simply agreed to pay the Turkish Bank if a proper demand upon the letter of credit is made and Crocker will be required to engage its own credit to meet that contractual obligation. The fact that Crocker's position as to the present letter of credit may be somewhat less secure in that it will not have any security interest in the goods sold serves to accentuate the fact of its direct liability. Crocker's expectation of immediate reimbursement from plaintiffs (real parties in interest) does not diminish its obligations under the letter of credit. (Cf. official com. to U. Com. Code, § 5-117.) Since there is no evidence in the record before this court which would support a finding that there is a special deposit as was the case in *Drewes*, *supra*, Crocker's primary liability under the letter of credit can only mean that its property is involved. Hence the facts of this case are more closely analogous to *Kemple*, *supra*, and *First Nat. Bank*, *supra*, than to *Drewes*, *supra*.

Moreover, Crocker faces the possibility that the Turkish Bank will exercise a banker's offset if it is not permitted to honor otherwise proper draws upon the letter of credit.

In addition, the obvious purpose of the prohibition in Section 91 against a state court's interference with the operation of a national banking association is to protect "them against suits or proceedings in state courts by which their efficiency would be impaired." (*Dennis v. First Nat. Bk. of Seattle* (1900) 127 Cal. 453, 455.) Since Crocker's contractual obligations under its letter of credit require that it engage its

own credit for the honor of the letter of credit and as Crocker may face loss of its assets in a foreign bank, the issuance of a preliminary injunction could impair the efficiency of a national banking association.

Accordingly, by reason of the foregoing, we conclude that under the circumstances of the instant case Section 91 forbids such action by a state court.

In view of our decision that as to Crocker, a national banking association, the superior court's issuance of a preliminary injunction was in violation of Section 91, we do not reach Crocker's other contentions including whether or not section 5114 of the Commercial Code precludes the issuance of an injunction. Our decision, however, is limited to defendant Crocker only. (Cf. *Steinmeyer v. Warner Cons. Corp.* (1974) 42 Cal.App.3d 515.)

DISPOSITION

Let a peremptory writ of prohibition issue directing that the superior court vacate and annul, as to defendant Crocker National Bank only, its order of November 15, 1976, granting plaintiffs' (real parties in interest) motion for a preliminary injunction in Los Angeles Superior Court case No. SOC 44418 entitled Thomas J. Palmer, Inc., et al. v. Charles S. Pettyjohn, et al. and thereafter refrain from further proceedings to enforce said order as to defendant Crocker National Bank only.

CERTIFIED FOR PUBLICATION

HANSON, J.

We concur:

LILLIE, Acting P.J.
THOMPSON, J.

**Exhibit "B". Final Order of California Supreme Court,
Dated May 26, 1977.**

ORDER DUE
May 31, 1977

ORDER DENYING HEARING

After Judgment by the Court of Appeal
2nd District, Division 1, Civil No. 49909
In the Supreme Court of the State of California

In Bank

Crocker National Bank, Petitioner v. The Superior Court of Los Angeles County, Respondent; Thomas J. Palmer Incorporated et al., Real Parties in Interest.

Real Parties in Interest's petition for hearing DENIED.

Supreme Court

Filed

May 26, 1977

G. E. Bishel, Clerk

Deputy

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 16th day of August A.D. 1977.

Clerk

By /s/ W. Johnson
Deputy Clerk

BIRD
Chief Justice

Exhibit "C". Preliminary Injunction, Dated November 15, 1976.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

THOMAS J. PALMER, INC., a corporation, LAKE CONSTRUCTION CO., INC., a corporation, KENNETH G. WALKER, an individual, THOMAS J. PALMER, an individual, Plaintiffs, vs. CHARLES S. PETTYJOHN, an individual; SMITH COAL SALES COMPANY, a corporation; EDWARD E. CRAIG, JR., an individual; WILLIAMS & RUBIN, a corporation; TURKISH IRON & STEEL WORKS, also known as TURKIYE DEMIR VE CELIK ISLETMELERİ GENEL MUDURLUGU; HARRY GEISSINGER, III, an individual; TURKIYE IS BANKASI AS; VULCAN ENERGY RESOURCES CORPORATION, a corporation, CROCKER NATIONAL BANK, a corporation; JOHN DOES 1 to 50, inclusive; JOHN DOE CORPORATIONS, 1 to 50, inclusive, Defendants. No. SOC 44418.

The application of the plaintiffs for preliminary injunction made herein came on regularly to be heard this 12th day of November, 1976 pursuant to an Order to Show Cause issued by this court on October 29, 1976.

Baum & Cohen by Leonard P. Baum appeared as counsel for the plaintiffs and Morrison & Foerster by Ronald F. Brot, appeared as counsel for the defendant Crocker National Bank; the remaining defendants, other than the fictitiously named defendants and the defendant Crocker National Bank, have been served

with a copy of the Summons and Complaint, Memorandum of Points and Authorities and the Order to Show Cause issued in this matter as required by the Order to Show Cause issued by this court on October 29, 1976.

Proof having been made to the satisfaction of the court, and good cause appearing therefor:

IT IS HEREBY ORDERED that during the pendency of this action the defendants, and each of them, and their officers, agents, representatives and all persons acting in concert or participating with them, shall be and they are hereby enjoined and restrained from engaging in, committing or performing, directly or indirectly, or by any means whatsoever, any of the following acts:

(a) From disbursing or paying, or causing to be disbursed or paid, any sums of money, credit or other emoluments under or pursuant to any of the provisions of that certain letter of credit represented or evidenced by a written "application and security agreement for a commercial letter of credit" dated December 4, 1975, No. 737415, and/or a letter of credit dated December 4, 1975, and/or an amendment thereto dated December 5, 1975, issued by Crocker National Bank, a copy of said documents being attached to the application made herein.

(b) From engaging in any act or omission to act which might cause any honoring of said letter of credit or which might cause the disbursement of any money, credit or other emoluments thereunder by Crocker National Bank.

—16—

Providing further that plaintiffs herein shall file a written undertaking in the sum of \$25,000.00 as required by Code of Civil Procedure Section 529, to indemnify the defendants for such damages as they may sustain by reason of this injunction if the court finally decides that plaintiff is not entitled thereto. The court retaining jurisdiction to modify said bond amount upon 24 hours notice of application therefor.

DATED: November 15, 1976.

MAX Z. WISOT
JUDGE OF THE SUPERIOR COURT

FILED

NOV 11 1977

MICHAEL RODAN, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-303

THOMAS J. PALMER, INC., LAKE CONSTRUCTION CO., INC.,
KENNETH G. WALKER and THOMAS J. PALMER,
Petitioners,

v.

CROCKER NATIONAL BANK and SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT**

Brief for Respondent Crocker National Bank in Opposition

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**In the Supreme Court of the
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**ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT**

**Brief for Respondent Crocker National Bank
in Opposition**

Petitioners have prayed that a writ of certiorari issue to review the order of the Supreme Court of the State of California, entered on May 26, 1977, denying petitioners' "Petition for Hearing on Peremptory Writ of Prohibition Issued by the Court of Appeal of the State of California, Second Appellate District." The judgment of the California Court of Appeal granting the writ of prohibition, rather than the California Supreme Court's order denying hearing, is the judgment of "the highest court of a State in which decision could be had", 28 U.S.C. § 1257, and therefore the

judgment subject to review by this Court on petition for writ of certiorari.*

In any event, however, the issues presented in the petition to this Court have become moot. As we explain fully below, the writ of prohibition granted by the Court of Appeal directed the California Superior Court for the County of Los Angeles to vacate a preliminary injunction it had entered against respondent Crocker National Bank (hereinafter "Crocker"), restraining Crocker from honoring any demand for payment, under a letter of credit, made by the letter of credit beneficiary—Turkiye Is Bankasi AS (hereinafter "Turkish Bank"). Petitioners here, plaintiffs in the underlying Superior Court action and participants as real parties in interest in the writ of prohibition proceeding, filed a petition for hearing in the California Supreme Court, which was denied. They then filed this petition. They failed, however, to seek from the Court of Appeal a stay of its writ pending decision on their petition to this Court. Accordingly, the writ of prohibition issued on September 22, 1977. In compliance with the writ, the Superior Court dissolved its preliminary injunction against Crocker on September 29, 1977.

Thereafter, Crocker repeatedly requested that petitioners supply it with information sufficient, under California law, to allow it to refuse to meet its otherwise clear legal obligation immediately to honor the demand for payment that Turkish Bank had made. Petitioners failed to do so.

*In denying petitioners' Petition for Hearing, the California Supreme Court declined to exercise the discretionary review authority granted it by Art. 6, § 12 of the California Constitution. In these circumstances, this Court repeatedly has recognized that, under § 1257, the writ of certiorari properly is directed to the highest state court that entered judgment on the merits—here, the California Court of Appeal. *E.g., Hammerstein v. Superior Court*, 341 U.S. 491, 492 (1951). R. Stern & E. Gressman, *Supreme Court Practice* § 6.31, at 290 (4th ed. 1969).

On October 17, 1977, Turkish Bank reiterated its demand, insisting upon payment at once. On October 21, Turkish Bank again notified Crocker that it expected immediate payment, and indicated that unless Crocker honored the demand for payment at once, Turkish Bank would protect its interest by exercising an offset against Crocker assets held by it in deposit. For this reason, and because of the lack, by that time, of any basis under California law for refusing to honor the obligation, Crocker was compelled to make payment under the letter of credit at the earliest opportunity. After having notified petitioners of all of these circumstances, Crocker paid Turkish Bank the principal due under the letter of credit on the morning of October 24, the next business day following receipt of the Turkish Bank's October 21 notice and, of course, prior to the issuance of a stay by this Court.

Because Crocker has now made payment under the letter of credit, any decision by this Court on the issues presented in the petition no longer could affect the substantive rights of any party. In brief, the act that petitioners have sought to enjoin has irretrievably occurred. *E.g., Brownlow v. Schwartz*, 261 U.S. 216 (1923). Accordingly, Crocker respectfully suggests that, as to the issues presented, there is absent a live case or controversy between the parties.

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District (Exhibit A in Petition Appendix) is reported at 68 Cal. App. 3d 863 (1977).

JURISDICTION

The petition, if treated as a petition for a writ of certiorari to the Court of Appeal of the State of California,

Second Appellate District, satisfies the jurisdictional requisites of 28 U.S.C. § 1257(3). The issues presented in the petition are, however, moot.

QUESTION PRESENTED

Whether the California Court of Appeal properly construed 12 U.S.C. § 91 as prohibiting a state court from preliminarily enjoining a national bank from meeting its legal obligation to make payment on proper demand under a letter of credit, where any payment would be made from the bank's own assets and where failure to make payment could result in loss to the national bank of its assets held by the letter of credit beneficiary.*

STATUTORY PROVISION INVOLVED

The pertinent provision of section 91 of the National Banking Act (12 U.S.C. § 91) is set forth in the Petition at page 2.

STATEMENT

The petition now before the Court is the most recent move in a complex set of litigative maneuvers by which petitioners have attempted to shift to respondent Crocker the primary risk of loss in a contract dispute between petitioners and others, a dispute in which Crocker had no part whatsoever. Although the issues presented in the petition are now moot, Crocker believes that the Court should have a full account of the commercial relationships that the peti-

*The petition purports to present a second question—whether 12 U.S.C. § 91 immunizes a national bank from responsibility for knowingly aiding or abetting others in the violation of a preliminary injunction issued prior to final judgment. This question was neither presented to nor decided by the California Court of Appeal, and therefore is not properly before this Court. *E.g., California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

tion concerns and the history of the litigation that they have engendered, in order to understand why mootness has resulted and why, in any event, the issues presented in the petition were not deserving of this Court's review.*

The commercial transactions on which this litigation is based are detailed in the Court of Appeal's opinion, which in turn relied on pleadings filed in the underlying Superior Court action. Briefly, the pleadings reveal the following facts:

Two Alabama corporations formed a joint venture—NATISCO—which entered into a contract to sell coal to Turkiye Demir Ve Celik Isletmeleri Genel Mudurlugu (hereinafter "Turkish Steel"). The coal sales contract required that NATISCO provide a guaranty of its performance. NATISCO then entered into a contract with petitioners by which, in exchange for the financing which NATISCO required to secure the necessary performance guaranty, petitioners received, *inter alia*, pledges of stock in NATISCO's two constituent corporations. Petitioners thereupon arranged to provide the performance guaranty required by the NATISCO-Turkish Steel contract. Pursuant to a letter of credit application submitted by certain of the petitioners, Crocker issued an irrevocable letter of credit, in the sum of \$522,000, in favor of Turkish Bank. Based on this irrevocable letter of credit naming it as beneficiary, Turkish Bank agreed to issue to Turkish Steel a letter of guaranty assuring NATISCO's performance. By the terms of the letter of credit agreement between Crocker and Turkish Bank, Crocker was to pay to Turkish Bank up to \$522,000 upon Turkish Bank's presentation of a document

*We submit the facts that support mootness in the form of a brief, rather than by affidavit, in accordance with what we understand to be the Court's usual practice. R. Stern & E. Gressman, *Supreme Court Practice* § 18.2, at 592 (4th ed. 1969).

stating that the amount of its letter of credit demand represented the amount Turkish Bank had been obliged to pay to Turkish Steel pursuant to the letter of guaranty. Under the terms of petitioners' letter of credit application, if Turkish Bank so drew upon the letter of credit, petitioners would reimburse Crocker for the amount Crocker had paid.

In April, 1976, because of asserted breaches of the contract in which petitioners had agreed to finance NATISCO, petitioners foreclosed upon the pledge of stock, acquiring all of the stock in one of NATISCO's two constituent corporations and ninety-eight percent of the stock in the other. Petitioners also obtained an injunction from the Circuit Court of the State of Alabama restraining certain persons or entities who were parties to or connected with the NATISCO venture and the financing agreement from, *inter alia*, making shipments of coal to Turkey under the NATISCO-Turkish Steel sales contract.*

On October 29, 1976, petitioners instituted the action in California Superior Court from which this petition has resulted. The complaint named as defendants the defendants in the Alabama state court action and, among others, Turkish Steel, Turkish Bank, and Crocker. The complaint alleged that all of the defendants, with the specific exception of Crocker, had conspired to usurp the benefits of the NATISCO-Turkish Steel sales contract and, in particular, had conspired to cause petitioners irreparable injury by taking advantage of the irrevocable letter of credit from Crocker that petitioners had secured. The complaint did not claim that Crocker in any way had violated or was about to violate any obligation to petitioners. To the contrary, the only allegation as to Crocker was that, if Crocker honored

a demand by Turkish Bank on the letter of credit, petitioners would suffer a loss of any amount so paid. As to all defendants except Crocker, the complaint sought damages. In addition, the complaint sought temporary and permanent injunctive relief. On November 15, the Superior Court granted the preliminary injunctive relief that petitioners had requested. It enjoined all defendants--including Turkish Steel and Turkish Bank, neither of which had appeared in the action—from taking any act that might cause the letter of credit to be honored. In addition, it enjoined Crocker from honoring any demand for payment under the letter of credit if any such demand was made.

Crocker immediately filed a petition to the California Court of Appeal for a writ of prohibition directing the Superior Court to vacate the preliminary injunction insofar as it restrained Crocker from honoring a proper demand on the letter of credit. Crocker sought this extraordinary relief on three separate grounds:

1. Petitioners had failed to demonstrate that, absent the injunction, they would suffer the irreparable injury requisite to such relief under California law; to the contrary, petitioners had clear legal remedies available—in defense against any reimbursement action by Crocker if Crocker paid wrongfully, as well as in damages against the remaining defendants.

2. Under California Commercial Code § 5114 the issuer of a letter of credit *must* honor a demand for payment that, on its face, complies with the letter of credit terms; in enacting section 5114, the California legislature specifically rejected the Uniform Commercial Code provision that would have allowed a court of equity to enjoin the issuer, in such circumstances, from honoring the demand.

*Neither Crocker, Turkish Steel, nor Turkish Bank was a party to the Alabama action.

3. 12 U.S.C. § 91 precludes a state court preliminary injunction restraining a national bank from honoring a letter of credit demand in the situation presented here.

The Court of Appeal found it necessary to address only the last of these grounds. The Court identified two primary, critical aspects to Crocker's obligations under the letter of credit. First, Crocker's obligation to pay upon proper demand was entirely independent of any performance or failure of performance under the Turkish Steel-NATISCO contract or the financing agreement that petitioners had entered. Second, upon proper demand, Crocker was obligated to pay under the letter of credit out of its own assets, regardless of whether it expected to receive reimbursement from petitioners. The Court described the nature of Crocker's obligation in the following terms:

In short, apparently what is present in the instant case is a letter of credit of guarantee for a "guarantee validity" by the Turkish Bank of a third party seller's performance under a contract. . . . Upon presentation of the documentary requirement (the signed statement by the Turkish Bank in accordance with the provisions of the letter of credit), Crocker is to honor drafts from its own funds. (Pet. App. at 9-10)

The Court concluded that, in these circumstances, 12 U.S.C. § 91 precluded a state court preliminary injunction preventing Crocker from honoring its obligation if proper demand was made. The Court found it clear that, because Crocker was obliged to honor proper demand regardless of whether or not it could expect reimbursement, the injunction necessarily affected the national bank's capacity to protect and dispose of its own assets. On that ground, the Court distinguished *Drewes & Co. v. Ham & Seymour*, 157 La. 861, 103 So. 241 (1925), in which the court had held a preliminary injunction proper, under the statutory pred-

ecessor to section 91, where any payment under the letter of credit was to be drawn from a special deposit made for that purpose and not part of the national bank's own assets. The Court of Appeal's decision rested, however, not only on the fact that the preliminary injunction affected Crocker's own assets, but also on the conflict between the injunction and the interests that section 91 was intended to protect. The Court observed, in particular, that if Crocker failed to honor a proper demand, Turkish Bank could exercise an offset against Crocker funds held by it in deposit:

Since Crocker's contractual obligations under its letter of credit require that it engage its own credit for the honor of the letter of credit and as Crocker may face loss of its assets in a foreign bank, the issuance of a preliminary injunction could impair the efficiency of a national banking association. (Pet. App. at 11-12)

Accordingly, the Court determined that a writ of prohibition should issue directing the Superior Court to vacate its preliminary injunction insofar as it applied to Crocker. The Court of Appeal entered its judgment on April 1, 1977. Petitioners thereupon filed a petition for hearing in the California Supreme Court. On May 26, the petition was denied.

While their petition for hearing to the California Supreme Court was pending, petitioners turned their efforts to the federal district courts. Petitioners first filed a complaint in the District Court for the Central District of California (No. CV 77-1624), repeating the substantive allegations of their Superior Court complaint and seeking preliminary and permanent injunctive relief against Crocker. The action was dismissed by judgment entered on May 10, 1977, for want of proper venue under 12 U.S.C. § 94. On May 11,

petitioners filed a complaint in the District Court for the Northern District of California (No. C 77-0971) again seeking injunctive relief against Crocker and observing that 12 U.S.C. § 91—the basis of the California Court of Appeal decision—has no application to federal courts.

Since section 91 was inapplicable, Crocker opposed petitioners' requests for a temporary restraining order and preliminary injunctive relief in the Northern District action on the alternative grounds that it had urged to the Court of Appeal. In brief, Crocker first pointed out that sections 5109 and 5114 of the California Commercial Code require that the issuer honor a demand for payment under a letter of credit if the demand is proper on its face (section 5114(1)) or, even though there is fraud in the underlying transaction, if the documents are proper and the demand is made by a holder in due course (section 5114(2)(a)). Since the demand that, by this time, Turkish Bank had made was proper on its face and petitioners had made no showing that Turkish Bank was not a holder in due course, Crocker was legally obliged to honor the demand. In any event, California Commercial Code § 5114(2)(b) provides that, even if the issuer is not compelled to honor by § 5114(1) or § 5114(2)(a), it has, in all cases, the privilege of honoring so long as it does so in good faith.* Moreover, in enacting these sections, the California legislature specifically rejected the Uniform Commercial Code provision that would have allowed courts to enjoin honoring of a demand by a beneficiary, and thus clearly demonstrated its view that such an injunction is inappropriate.

Crocker also opposed petitioners' request to the district court on the ground that they had failed to demonstrate

*These California Commercial Code provisions are reprinted in the Appendix to this brief.

the requisite bases for preliminary equitable relief. On the one side, petitioners had failed to show that they would suffer irreparable injury if Crocker honored Turkish Bank's demand, since they clearly have an adequate remedy at law if either the demand itself or Crocker's action in honoring it breached any legal obligation to them. On the other side, Crocker had clearly shown that, were it restrained from making payment, it would suffer irreparable injury, since Turkish Bank was not within the court's jurisdiction, and Crocker's failure to honor its demand would cause Turkish Bank to seize, by way of set off, the Crocker funds which it held.

On May 11, 1977, primarily because of the California Commercial Code provisions discussed above and grave doubt as to whether the court had, or could have, jurisdiction over Turkish Bank, District Judge Renfrew denied petitioners' application for a temporary restraining order. On May 23, 1977—the same day on which Crocker filed its opposition—petitioners withdrew their application to the district court for a preliminary injunction.*

As indicated above, Crocker had by this time received demand for payment from Turkish Bank that complied in all respects with the letter of credit terms.** In response to

*Crocker filed a motion to dismiss the Northern District action on October 19, 1977, on the grounds that the complaint failed to state a claim against Crocker and that the court lacks jurisdiction over indispensable parties—in particular, Turkish Bank. By stipulation between Crocker and petitioners, Crocker has agreed to withdraw the motion without prejudice, to give petitioners an opportunity to file an amended complaint.

**Turkish Bank initially made demand in late January, 1977. Crocker informed Turkish Bank that the documentation provided did not, in certain technical respects not here relevant, comply with the letter of credit requirements. In late February, Turkish Bank provided a new demand and documentation to cure the original deficiencies. Crocker again noted a technical deficiency. Finally, on March 13, 1977, Crocker received from Turkish Bank a demand and documentation that fully conformed to the letter of credit terms.

this demand, and to repeated cables from Turkish Bank in March and April, 1977, insisting that it be honored, Crocker informed Turkish Bank that both apparently remained subject to the Superior Court injunction and that Crocker was making every legal effort to have the injunction, as to Crocker, removed. On June 14, 1977, officers of Crocker met with representatives of Turkish Bank and informed them that, although the Court of Appeal had decided in Crocker's favor and although the California Supreme Court had denied hearing, the writ of prohibition had not issued and the preliminary injunction as to Crocker remained in effect. Moreover, the writ would have no effect on the injunction as to Turkish Bank—an injunction concerning which Crocker plainly had notice.

On August 23, 1977, petitioners filed the present petition to this Court. In Crocker's view, the reasons presented in the petition as justifying this Court's review were, on the face of the petition itself, plainly devoid of merit and were entirely refuted in the Court of Appeal opinion. Indeed, Crocker believed that the only possible basis for any favorable action on the petition was this Court's own intervening decision in *Third National Bank in Nashville v. Impac Limited, Inc.*, 45 U.S.L.W. 4738, decided June 17, 1977—a decision that petitioners apparently regarded as irrelevant to this case, since they nowhere relied upon or even cited it in their petition. Moreover, it appeared that if *Impac* was relevant at all, it would at most justify a remand for reconsideration by the California Court of Appeal, and, of course, Crocker knew that this Court was fully aware of its own decision and would be able to identify from the Court of Appeal's opinion whether, under *Impac*, a remand was appropriate. In these circumstances, Crocker, on advice of counsel, decided that the expense required to file an opposi-

tion—an expense that would only add to the enormous cost it had already incurred in attempting to meet its letter of credit obligation—was unjustified unless a response was requested by the Court.

In filing the petition to this Court, petitioners inexplicably failed to seek or obtain from any California court a stay of the Court of Appeal's writ, despite the clear availability of such relief under 28 U.S.C. § 2101(f).^{*} Because of petitioners' failure, the writ issued on September 22, 1977. On September 29, in compliance with the writ, the Superior Court vacated its preliminary injunction insofar as it directed Crocker not to honor Turkish Bank's demand.

Once the Superior Court vacated the preliminary injunction it had entered as to Crocker, no order of any court

*In their application to Mr. Justice Rehnquist for an order directing Crocker to maintain the *status quo* pending action by this Court—an application that was not filed until October 24, 1977—petitioners attempted to explain this failure by stating that "there is considerable uncertainty whether any of the three [California] courts involved or any judge of those courts has jurisdiction to grant the requested relief . . ." In fact, however, 28 U.S.C. § 2101(f) provides, in pertinent part, that:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution or enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court. . . . (Emphasis added.)

There can thus be no doubt that, as a matter of federal law, the California Court of Appeal had power to stay its mandate on proper application. *In re Chessman*, 43 C.2d 408, 413, 274 P.2d 645 (1954) (Carter, J.). Presumably, therefore, the uncertainty that petitioners expressed in their October 24 application must attach, not to the California courts' power to entertain a stay application, but to their power, once the original injunction had been vacated, to renew the injunction pending this Court's decision. But petitioners' uncertainty cannot excuse their inexplicable failure to seek any relief at any time from any California court—a failure that, under this Court's Rule 27, normally would preclude favorable action on their application to a Justice of this Court.

restrained Crocker from honoring a demand under the letter of credit. Moreover, there was no indication from petitioners that they were taking, or planned to take, any action to seek interim relief, even though they were aware that, in March, Crocker had received from Turkish Bank a demand for payment under the letter of credit that complied in all respects with the letter of credit requirements.

Crocker nonetheless refrained from honoring Turkish Bank's demand because Turkish Bank apparently remained subject to those aspects of the Superior Court's preliminary injunction that had not been vacated. In so acting, Crocker exposed itself to considerable danger. Failure to honor could result in Turkish Bank's seizing Crocker's assets. If that occurred, Crocker would be faced with a Hobson's choice. On the one side, it could attempt to litigate—in Turkey—the legality of the set off. This alternative would cause enormous legal expense. In addition, its success would be at best unlikely, given the clear California Code provisions requiring issuers to honor proper demands and the probability that, as to Turkish Bank, the California Superior Court lacked jurisdiction to enter any injunction at all. On the other side, Crocker could treat the seizure of its funds as the equivalent of payment under the letter of credit and then seek reimbursement from petitioners—an alternative that, to all appearances, would also generate expensive and protracted litigation and the success of which would be equally uncertain.

Recognizing the difficulty of Crocker's position, Turkish Bank, despite Crocker's failure to pay, did not immediately attempt to seize Crocker's funds. Instead, on September 22, 1977, it filed in the Superior Court motions to quash service of process and to dismiss for want of jurisdiction. On October 12, 1977, the Superior Court granted the motion to quash on the ground that petitioners had failed to comply

with requirements both of California law and of a treaty to which Turkey and the United States are parties. Since a preliminary injunction is an *in personam* decree, e.g., *Berger v. Superior Court*, 175 C. 719, 721, 167 P. 143 (1917), and since a court may not issue a judgment *in personam* without having acquired jurisdiction over the party to whom the judgment applies, e.g., California Code of Civil Procedure § 1917, it appeared that the preliminary injunction previously entered by the Superior Court was, as to Turkish Bank, no longer effective. Accordingly, as of October 12, there no longer appeared to be any legal basis whatsoever for Crocker to avoid honoring Turkish Bank's demand.

Faced with this situation, Crocker, by letter from its counsel dated September 30, 1977, requested petitioners to supply information sufficient, under California law, to warrant Crocker's continued refusal to honor the demand. In particular, Crocker asked petitioners what facts supported the conclusory allegations, contained in their various complaints, that Turkish Bank had engaged in fraudulent conduct and so was not a holder in due course. On October 10, 1977, confirming telephone conversations in the intervening period, petitioners' counsel responded that it was a "physical impossibility for [him] to comply with the request." On October 12, petitioners and their counsel met with the Chairman of Crocker's Board of Directors, Mr. Thomas Wilcox, and with Crocker's counsel and other officers. Again petitioners could offer no information to substantiate their allegations as to Turkish Bank. Mr. Wilcox agreed, however, to ask the Turkish Bank's assistance in arranging a meeting among the parties to the underlying contract dispute. He did so by cable of October 13, 1977, asking, in addition, for Turkish Bank's patience in receiving payment on its demand.

By October 12, when the service of process on Turkish Bank was quashed, the situation had become, from Crocker's standpoint, critical. On October 14, Crocker's counsel reiterated the request for substantiating information and, in particular, asked whether petitioners claimed that Turkish Bank was not a holder in due course. Petitioners' counsel again responded that they were unable to supply the information at that time. On the same day, Crocker was asked by this Court to submit a response to the petition for certiorari no later than November 11.

On October 17, Crocker received from Turkish Bank a cable observing that service upon it had been quashed and demanding that Crocker effect payment at once. Crocker immediately notified Turkish Bank of this Court's request for a response. On Friday, October 21, Crocker received a second cable from Turkish Bank, stating that, while it was willing to help arrange a meeting among the parties to the contract dispute, it could not delay its insistence on payment. The cable further indicated that, unless Crocker made payment at once, Turkish Bank would take appropriate action with respect to the Crocker deposits that it held. Because of this and because Crocker could perceive no legal basis whatsoever for postponing payment any longer, on Friday, October 21, Mr. Wilcox notified petitioners that Crocker intended to make payment at the opening of business on the next business day—Monday, October 24.

On that morning, petitioners' counsel notified Crocker that they contemplated an application to this Court for a stay of the Court of Appeal's judgment. Since that judgment had issued and the preliminary injunction had been vacated nearly one month before, and since, despite the general requirement of this Court's Rule 27, no such relief had been sought from any California court at any time in the six months since the Court of Appeal judgment had

been entered, Crocker believed that it was, at best, highly doubtful that any such stay would issue or, if it did, that the injunction against Crocker would be brought back to life. In any event, Crocker believed that such an eleventh hour application, in uncertain form and with such highly uncertain effect, could not justify any delay in payment, given its otherwise clear legal obligation and the equally clear threat to its assets contained in the most recent Turkish Bank communications. Accordingly, at approximately 10 A.M.* Crocker's counsel notified petitioners' Washington counsel that Crocker would make payment immediately. At 11:57 A.M., Crocker honored Turkish Bank's demand. At approximately 2:00 P.M., Crocker's counsel received notice that, at approximately 1:30 P.M., a stay had issued and would remain in effect pending Crocker's response to the application.

ARGUMENT

Crocker has presented this detailed account of the circumstances underlying this petition in order to clarify as much as possible the situation which led to its payment of Turkish Bank's demand. As a result of petitioners' litigative maneuvers, Crocker was placed in an impossible position. If it failed to pay Turkish Bank once proper demand had been received, it violated the clear requirements of the California Commercial Code and, moreover, risked loss of its assets held in deposit by Turkish Bank. If it paid Turkish Bank while a preliminary injunction against either Crocker or Turkish Bank remained outstanding, it was open to charges that it had itself violated an injunction, or had aided and abetted others in doing so, and in all events faced the prospect of long and expensive litigation in an effort to

*All times referred to are Pacific Daylight Time.

secure reimbursement. The purpose of petitioners' efforts is evident. If Crocker could be delayed from paying until Turkish Bank, in exasperation, seized Crocker's assets, Crocker would have the burden of litigating to recover the loss, whether from petitioners or from Turkish Bank, and the result would be uncertain and long in coming. In short, Crocker would bear the primary risk of loss in the underlying contract dispute—a dispute in which, as petitioners' own complaint specifically acknowledges, Crocker played no part and committed no wrong.*

I. The Issues Presented in the Petition Are Moot.

The petition seeks to have this Court decide whether the Court of Appeal properly ordered that the preliminary injunction against Crocker be vacated. Since Crocker has made the payment that petitioners sought to prevent, the issue between the parties is no longer whether such payment properly is subject to a preliminary injunction in the state court. It is, instead, whether Crocker can secure reimbursement. Any eventual resolution of this issue will in no way depend on whether the Court of Appeal's decision was correct,** and there is, moreover, no reason to suppose that

*Petitioners' failure to seek a stay from the Court of Appeal was consistent with this overall effort. Had they sought a stay Crocker would have been able to raise in opposition the provisions of the California Commercial Code that, in the Northern District action, led Judge Renfrew to deny interim relief.

**In this connection, it should be emphasized that, given the circumstances in which Crocker finally honored Turkish Bank's repeated demand for payment, its action is unlikely to have prejudiced petitioners. Had Crocker not made payment and had Turkish Bank seized Crocker's assets, Crocker could have chosen to treat any such seizure as the practical equivalent, and the equivalent in law, of payment on the demand, and, therefore, sought reimbursement from petitioners. Thus, the positions of all parties would have been, as a practical matter, equivalent to their positions now. In addition, of course, petitioners' claims against all parties—including Turkish Bank—are unaffected by Crocker's action.

the unique and highly complex dispute among the parties that generated this petition will, as to the issues the petition seeks to have resolved, recur. Accordingly, no action by this Court on the petition possibly could affect the substantive rights of any party, and Crocker therefore suggests that there is lacking a case or controversy between the parties requisite to this Court's jurisdiction. *E.g., Fortson v. Toombs*, 379 U.S. 621 (1965); *Brownlow v. Schwartz*, 261 U.S. 216 (1923).

II. The Petition Did Not, in Any Event, Warrant Exercise of This Court's Certiorari Power.

Even if the issues were not moot, the reasons presented in the petition plainly fail to demonstrate that the Court of Appeal's decision should be reviewed by this Court. Petitioners' argument essentially is that, under this Court's decisions in *Earle v. Commonwealth of Pennsylvania*, 178 U.S. 449 (1900) and *Capital National Bank of Lincoln v. First National Bank of Cadiz*, 172 U.S. 425 (1899), 12 U.S.C. § 91 forbids state courts from issuing interlocutory orders of attachment, injunction or execution only when such orders relate to the national bank's own assets. Since, in petitioners' view, the letter of credit involved in this case was a liability of the bank, rather than an asset, section 91 did not apply.

The decision of the Court of Appeal, however, in no way conflicted with the basic interpretation of section 91 in *Earle* and *Capital National Bank*. To the contrary, the Court concluded that, because Crocker had the primary obligation to satisfy any demand under the letter of credit from its own assets and because failure to do so could result in loss to Crocker of assets held by the letter of credit beneficiary, the preliminary injunction necessarily

related to Crocker's assets and hence, under the *Earle-Capital National Bank* standard, was forbidden by section 91. In short, petitioners do not contend that the Court of Appeal applied an erroneous legal standard. Instead, they contend that the Court applied the correct legal standard erroneously to the particular facts before it.

This Court repeatedly has emphasized that its certiorari power is not exercised merely to correct this sort of error, at least absent a demonstration that the particular problem is both recurrent and important, or that the decision conflicts with decisions of other courts. No such demonstration is possible here. Indeed, in the entire history of section 91, no other court apparently has addressed its proper application to the kind of banking transaction involved in this case. The problem with which the Court of Appeal dealt is thus neither recurrent, productive of conflict, nor important in the sense justifying exercise of the certiorari power—*i.e.*, important to the public, rather than merely to the particular parties involved. *E.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This Court's decision in *Third National Bank in Nashville v. Impac Limited, Inc.*, 45 U.S.L.W. 4738 (June 17, 1977), reached subsequent to the Court of Appeal's decision in this case, does, of course, constrict the traditional section 91 standard on which, in part, the Court of Appeal relied. The Court of Appeal decision, however, is addressed to a highly unusual section 91 problem. It does not conflict in any way with *Impac's* holding nor does it suggest a need to reconsider the general problem of interpretation of section 91 that this Court so recently has addressed.

We recognize, nonetheless, that in ordinary circumstances an intervening decision by this Court might justify a remand to allow the lower court to determine whether, under

the standards this Court's decision has announced, it continues to believe that its interpretation is correct. In this case, however, a remand would have been unwarranted. *Impac* identified two polar, paradigm situations to which the language of section 91 arguably could apply, considering each in light of the congressional purpose: "to prevent state judicial action, prior to final judgment, which would have the effect of seizing the bank's property." 45 U.S.L.W. at 4741. On the one side was the situation of prejudgment seizure of bank property by its creditors, to which both the language and purpose of the statute clearly applied. On the other side was the situation presented in *Impac* itself—an action by a debtor seeking a preliminary injunction to protect its own property from wrongful foreclosure. The Court concluded that, in the latter situation, the purpose of the statute was not implicated at all and, accordingly, that section 91 did not preclude a state court from enjoining the national bank's allegedly wrongful act.

The situation in this case bears no resemblance to the wrongful foreclosure situation presented in *Impac*. To the contrary, it is identical, in practical consequences, to the kinds of prejudgment seizure by creditors to which, as *Impac* recognized, section 91 clearly applies. The interests that section 91 was intended to serve—"to minimize the risk of insolvency for national banks, and to protect bank creditors from disparate treatment"—clearly could be injured by an injunction against payment under a letter of credit, especially where, as here, failure to make payment could result in seizure and possible loss of the bank's assets and where these consequences could be avoided, if at all, only at substantial expense to the bank. Moreover, unlike the wrongful foreclosure situation in *Impac*, these consequences would follow even though the bank is alleged to have committed no legal wrong at all, and the action

against the bank is no more than a maneuver designed to increase plaintiff's likelihood of ultimate success in a dispute with third parties.

These consequences, and their adverse effects on interests that section 91 was intended to protect, were recognized and articulated in the Court of Appeal's decision. Since the result of that decision is fully consistent with *Impac's* holding, and since its reasoning comports with the purposes of the statute that *Impac* identified, a remand simply would have added unnecessarily to the delay and expense that this litigation already has caused.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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RONALD G. CARR

*Counsel for Respondent
Crocker National Bank*

Dated: November 10, 1977

(Appendix Follows)

Appendix

California Commercial Code § 5109:

(1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility

(a) For performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or

(b) For any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand or document in transit or in the possession of others; or

(c) Based on knowledge or lack of knowledge of any usage of any particular trade.

(2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.

California Commercial Code § 5114:

(1) An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. The issuer is not excused from honor of such a draft or demand by reason of an additional general term that all documents must be satisfactory to the issuer, but an issuer may require that specified documents must be satisfactory to it.

(2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the warranties made on negotiation or transfer of a docu-

Appendix

ment of title (Section 7507) or of a security (Section 8306) or is forged or fraudulent or there is fraud in the transaction

(a) The issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances which would make it a holder in due course (Section 3302) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (Section 7501) or a bona fide purchaser of a security (Section 8302); and

(b) In all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents.

(3) Unless otherwise agreed an issuer which has duly honored a draft or demand for payment is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit.

IN THE
Supreme Court of the United States

Supreme Court, U. S.

R I L E D

NOV 17 1977

MICHAEL RODAK, JR., CLERK

October Term, 1977
No. 77-303

**THOMAS J. PALMER, INC., LAKE CONSTRUCTION CO.,
INC., KENNETH G. WALKER and THOMAS J. PALMER,**
Petitioners,

vs.

**CROCKER NATIONAL BANK and SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR THE COUNTY OF
LOS ANGELES,**

Respondents.

**Reply Brief of Petitioners to Respondent's Brief in
Opposition to Petition for a Writ of Certiorari.**

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IN THE
Supreme Court of the United States

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Statutory Authority.

Rule 24(4) of the Rules of the Supreme Court provide that a petitioner who has filed a petition for a writ of certiorari may submit a reply brief addressed to arguments first raised in the brief in opposition. This reply brief is being filed in accordance with rule 24(4).

Statement.

Respondent's brief in opposition is a remarkable exercise in self-serving rhetoric. Simply stated, it presents the position of an understandably biased advocate and generally concerns itself with matters not before this Honorable Court.

For example, there is a discussion pertaining to the subsequent actions filed by petitioners in the Central District and then the Northern District of California which is replete with erroneous conclusions not supported by any record. However, it is not necessary to delve into those matters herein as they are far beyond the record before this court and have no bearing on the instant petition for a writ of certiorari.

Respondent complains at page 2 of its brief in opposition that petitioners have failed to supply it with information to allow it to refuse to pay the letter of credit. Crocker needs only to examine the complaint on file which is filled with allegations of wrongdoing and of a tortious conspiracy. In fact, Crocker refers to the complaint at page 6 of its own brief. Additionally Crocker is well aware that petitioners assert that the letter of credit had expired on December 31, 1976. Regardless of these inconsistencies, it is all beyond the record before this court.

Respondent indicates that there is serious doubt as to whether California has jurisdiction over the Turkish Bank. While this, too, is not before this court, it is petitioners' position that California does, indeed, have jurisdiction over the Turkish Bank. In this regard, the order of the Superior Court granting the motion of the Turkish Bank to quash service of summons was based upon the manner of service, not upon the question of jurisdiction which has not yet been decided.

Respondent then asserts that California Commercial Code, Sections 5409 and 5414 required it to honor the Turkish Bank's demand. Petitioners, however, have a different view of Sections 5409 and 5414. Nevertheless, the effect of the California Commercial Code

has not been decided by a California court in this case, is not an issue before this court and, further, does not contain any provision which precludes injunctive relief.

It is then interesting to note that respondent delineates, at page 17 of its brief in opposition, a particular time sequence with regard to the order issued by the Honorable Justice William H. Rehnquist on October 24, 1977, in which respondent states that, "At approximately 10 A.M. Crocker's counsel notified petitioners' Washington counsel that Crocker would make payment immediately. At 11:57 A.M., Crocker honored Turkish Bank's demand. At approximately 2:00 P.M., Crocker's counsel received notice that, at approximately 1:30 P.M., a stay had issued and would remain in effect pending Crocker's response to the application." On the one hand, petitioners understand this presentation as being that of an advocate, but, on the other hand, petitioners object to the manner of presentation which omits certain material facts.

The time sequence should include that at approximately 9:30 A.M.,¹ petitioners' California counsel advised respondent's California counsel that it would be seeking a "stay order" from Justice Rehnquist and would be associating Washington counsel. Respondent's California counsel asked for the identity of the Washington counsel in order to have its own counsel contact them and perhaps join in an appearance before Justice Rehnquist. This courtesy was, of course, extended. Thus, respondent had full knowledge that petitioners were seeking an order and were afforded the opportunity to present opposition.

¹All times are Pacific Daylight Time, October 24, 1977.

Despite this knowledge, shortly after noon, respondent's California counsel advised petitioners' California counsel that Crocker had paid the letter of credit at 11:57 A.M. At approximately 1:30 P.M., petitioners' California counsel learned that Justice Rehnquist had issued an order staying the order of the California Court of Appeal, and shortly thereafter, petitioners' counsel so advised respondent's counsel.

It must be noted, as it is of considerable significance, that when it is noon in California, the approximate time that Crocker alleges it paid the letter of credit, it is 10:00 P.M. in Turkey, hardly a business hour. Thus, there is a considerable question as to whether Crocker's payment had, in fact, culminated at 11:57 A.M. or whether Crocker had ample opportunity to cancel or reverse what it had done so as to comply with the order of Justice Rehnquist. Thus, there is a substantial issue as to whether payment had actually been made or the payment process had been completed before Crocker received notice of the order of this Court. It will be interesting to ascertain just what mischief has been occasioned by Crocker's precipitous conduct.

ARGUMENT.

I.

The Question as to Whether 12 U.S.C. 91 Immunizes a National Bank From Responsibility for Knowingly Aiding and Abetting Others in the Violation of a Preliminary Injunction Issued Prior to Final Judgment Remains a Viable Issue.

As may be gleaned from the petition for writ of certiorari, the order of the California Court of Appeal vacating the Superior Court injunction was as to Crocker only and did not effect the injunction as to the remaining defendants.

Respondent cursorily states in a footnote at page 4 of its brief in opposition that "The petition purports to present a second question—whether 12 U.S.C. Section 91 immunizes a national bank from responsibility for knowingly aiding or abetting others in the violation of a preliminary injunction issued prior to final judgment." Respondent then cites *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957) for the proposition that this question is not properly before this court. Such a conclusion is wholly erroneous. In the footnote of the *Taylor* case cited by Crocker, the Supreme Court states, "The Court of Appeals, however, held that this contention had been waived. . ." No such holding of waiver was made by a California court in the instant action. Further, and of considerable importance, the issue did not arise until the California Court of Appeal issued its order vacating the injunction as to Crocker. It is that order to which this petition is directed and it is that order which created this particular issue. One cannot be deemed to have waived an issue which did not yet exist.

II.

The Petition for Writ of Certiorari Is Not Moot.

On October 24, 1977, the Honorable William H. Rehnquist issued an order which had the effect of reinstating the injunction against Crocker issued by the California Superior Court for the County of Los Angeles. On that very same day, respondent alleges that it paid the letter of credit to the Turkish Bank, but that it did so prior to receiving notice of Justice Rehnquist's order. This question remains an extremely viable one which may not so easily be resolved by Crocker's rather casual and cavalier position.

It remains to be determined whether Crocker's knowledge of petitioners' application before Justice Rehnquist constitutes sufficient notice OR whether Crocker did, in fact, pay prior to notice OR whether the payment process had, in fact, been completed prior to notice OR whether Crocker had the ability to reverse or cancel what it had done to the point when it did receive notice. After all, as pointed out hereinabove, there is a ten-hour time difference between California and Turkey.

In addition to the above, the second question presented by petitioners, whether 12 U.S.C. 91 immunizes a national bank from responsibility for knowingly aiding or abetting others in the violation of a preliminary injunction issued prior to final judgment, is most certainly not moot.

Regardless of whether the injunction was properly dissolved as to Crocker or whether Crocker paid prior to notice of Justice Rehnquist's stay order, the injunction remained in effect as to all other defendants. Only the Turkish Bank (Turkiye Is Bankasi AS)

quashed service of the summons and complaint. However, it did not move to vacate or quash the injunction against it. There is much authority for the proposition that, in a situation such as this, the injunction against the Turkish Bank remained in effect. Included among this authority is *Ex Parte Lennon*, 166 U.S. 548, 554 (1897), in which the United States Supreme Court held:

The fact that petitioner was not a party to such suit, nor served with process of subpoena, nor had notice of the application made by complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice.

Based on the developments of this case and the record before this court, all issues remain viable and a true case or controversy remains.

Conclusion.

In conclusion, petitioners would respectfully make reference to *Third National Bank in Nashville v. Impac Limited, Inc.*, 97 S.Ct. 2307 (1977), a decision that respondent suggests at page 12 of its brief in opposition, "That petitioners apparently regarded as irrelevant to this case, since they nowhere relied upon or even cited it in their petition."

With sincere apologies to this Court, the instant petition for a writ of certiorari was written in August, 1977 and filed on August 23, 1977. Unfortunately, petitioners did not yet have knowledge of the *Third National Bank in Nashville* case as the decision was handed down in June, 1977. However, the *Third National Bank in Nashville* case was relied upon by petitioners in its application for a stay presented to Justice Rehnquist on October 24, 1977 and it is the position of the petitioners that this case clearly holds that 12 U.S.C. 91 does not preclude a state court from issuing an injunction against a national bank prior to final judgment in a case such as that now before this court. For all of the reasons set forth herein and in its petition for a writ of certiorari, petitioners respectfully pray that their petition be granted.

DATED: November 16, 1977.

Respectfully submitted,

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